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3-24-08

No. 06-7517

In the Supreme Court of the United States

RICHARD IRIZARRY, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether Federal Rule of Criminal Procedure 32 requires a district court to provide the parties with notice before varying under 18 U.S.C. 3553(a) from the advisory Sentencing Guidelines range based on a ground not identified in the presentence report or the parties' submissions.

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OPINION BELOW

The opinion of the court of appeals (J.A. 392-400) is reported at 458 F.3d 1208.

JURISDICTION

The judgment of the court of appeals was entered on August 1, 2006. The petition for a writ of certiorari was filed on October 26, 2006. The petition was granted on January 4, 2008. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

The relevant constitutional provisions, statutes, and rules are reprinted in an appendix (App., *infra*, 1a-18a) to this brief.

STATEMENT

Following a guilty plea, petitioner was convicted in the United States District Court for the Southern District of Alabama of making a threatening interstate communication, in violation of 18 U.S.C. 875(c). He was sentenced to five years of imprisonment, to be followed by three years of supervised release. J.A. 382, 384. The court of appeals affirmed his sentence. J.A. 392-400.

1. In May 2004, a grand jury in the Southern District of Alabama charged petitioner with 15 counts of making a threatening interstate communication, in violation of 18 U.S.C. 875(c). J.A. 19-22. Petitioner pleaded guilty to one of the counts, which alleged that, on November 5, 2003, he transmitted an interstate e-mail threatening to kill or injure his ex-wife and her new husband. *Ibid.*; J.A. 272-276.

In the factual resumé accompanying his plea, petitioner acknowledged that his ex-wife had custody of their two children and that he was "permanently" restrained from contacting her or the children and from "physically abusing, molesting or harassing [them] in any way." J.A. 274. He also admitted that he "knowingly and willfully" transmitted across state lines the e-mail threatening to kill his ex-wife and her new husband. J.A. 273-274. The subject heading on the e-mail was "You have been warned for the very last time for my patience is gone!" J.A. 273. The text stated in part:

> Books have you read any lately? I have one in particular on how to make bombs for who knows if i have reason to level something. * * * [T]hink it over for when the gun is aim and the blood begins to pour it is then to late. * * * Leah or whom ever are you willing to die for what you believe as i am? * * * I

> see the future i have wanted to avoid now but this is the only way. No parents is what you children will have. * * * Leah i hope you have a better plan for i am coming and you will answer. You and Kim crying before me and we will see which of you chooses who over the other when i take aim!

J.A. 273-274. Petitioner admitted that he had sent "dozens of other similar e-mails" threatening his ex-wife, her new husband, her mother, and others. J.A. 275. He acknowledged that he intended the e-mails "to convey true threats to kill or injure" those people. *Ibid.* The district court accepted petitioner's guilty plea. J.A. 277.

2. a. Several months before accepting petitioner's plea, the district court held a hearing to determine whether petitioner was competent to stand trial. J.A. 25-259. Four witnesses testified—petitioner; K. Lyn Hillman, petitioner's counsel at that time;[1] Dr. Rodolfo Buigas, a forensic psychologist who testified as an expert for the government; and Dr. Thomas S. Bennett, a psychologist who testified as an expert for the defense. *Ibid.* The court also received psychiatric reports from both Dr. Buigas and Dr. Bennett. J.A. 2.

Petitioner testified that he made the threats against his ex-wife and others in retaliation for acts they committed against him, including purportedly mistreating his children and preventing him from seeing them. J.A. 33-34, 66-67. Hillman testified that petitioner did not believe he was mentally ill. J.A. 238. She also testified that, although petitioner believed his claims that his wife had threatened him, was involved with the Ku Klux Klan, and was abusing the children, those claims "were

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[1] Ms. Hillman withdrew as defense counsel before sentencing, and the court appointed new counsel. J.A. 4.

not true." J.A. 265; see J.A. 232-234. Hillman also stated that petitioner had "indicated if he was sentenced to five years, when he got out, he would kill his ex-wife, he would also kill his children, and kill her boyfriend." J.A. 239.

Dr. Buigas diagnosed petitioner as having an anxiety disorder and a borderline personality disorder with paranoid and antisocial features. J.A. 126, 128. Dr. Buigas concluded that petitioner did not have a "serious mental illness," see Forensic Evaluation by Dr. Rodolfo Buigas 9 (Apr. 28, 2004) (Buigas Report), and that he was competent to stand trial, J.A. 147. Dr. Buigas further concluded that petitioner's personality disorder was "long-standing," "characterological," and "resistant to change." Buigas Report 10-11. Dr. Buigas disagreed with defense expert Dr. Bennett, who diagnosed petitioner with a delusional disorder that would interfere with his ability to assist his attorney. J.A. 135, 175, 186. Dr. Bennett also reported that petitioner "has apparently not been tried on antipsychotic medications, which may well improve his thinking." Psychological Evaluation by Dr. Thomas S. Bennett 5 (Feb. 6, 2004) (Bennett Report). Dr. Buigas agreed that if, contrary to his own view, petitioner was delusional, antipsychotic medications "could mitigate" delusional symptoms. J.A. 146.

The district court found that Dr. Buigas's diagnosis of petitioner's mental condition was more likely correct than Dr. Bennett's. J.A. 267. The court found that petitioner was not suffering from "delusions" and that his mental condition was "longstanding and not likely to change." J.A. 268-269. Accordingly, the court determined that petitioner was "not incompetent to stand trial or to plead guilty." J.A. 267.

b. After petitioner pleaded guilty but before his sentencing, the district court ordered his examination by the Bureau of Prisons to determine whether he required treatment in a special facility. J.A. 288-290. The report from the Butner Federal Medical Center (FMC) concluded that petitioner could be treated in a prison facility. See Forensic Evaluation by Butner FMC 14 (Feb. 7, 2005) (Butner FMC Report). The FMC reported, however, that he had declined psychiatric medication and that he "currently is not motivated to engage in any treatment." *Ibid.*; see *id.* at 11. The FMC concluded that, "if released to the community, [petitioner] would pose a risk of harm to his ex-wife and anyone associated with her, as well [as] possibly his children." *Id.* at 14.

3. Before petitioner was sentenced, this Court decided *United States* v. *Booker*, 543 U.S. 220 (2005). To remedy a Sixth Amendment violation in mandatory Guidelines, *Booker* held that the federal Sentencing Guidelines must be treated as "effectively advisory." *Id.* at 245. Before *Booker*, a federal district court could not depart from the Guidelines sentencing range except in limited circumstances described generally in 18 U.S.C. 3553(b) (2000 & Supp. V 2005) and set out in detail in the Sentencing Guidelines, see Guidelines § 4A1.3, Ch. 5, Pts. H and K (2004). After *Booker*, district courts may sentence outside the Guidelines range not only when authorized by the Guidelines but whenever warranted by the general sentencing criteria in 18 U.S.C. 3553(a) (2000 & Supp. V 2005). See *Booker*, 543 U.S. at 245. Those criteria include, among other things, the need for the sentence imposed to "protect the public from further crimes of the defendant." 18 U.S.C. 3553(a)(2)(C).

4. The presentence report (PSR) prepared for petitioner's sentencing identified his ex-wife as the primary

victim of his offense. J.A. 406. The PSR stated that she and petitioner were divorced after she claimed that he had physically abused her and threatened their children. J.A. 404, 411. The PSR noted that the judge presiding over the divorce had found that petitioner "is imminently capable of carrying out his threats" and had issued an order restraining petitioner from contacting his ex-wife and their children. J.A. 411. The PSR also recounted the expert testimony from the competency hearing. J.A. 412-413.

The PSR further noted that the 15 e-mails charged in the May 2004 indictment would be provided to the court with the PSR. J.A. 405. The government had provided the e-mails to petitioner at arraignment. See Letter from United States Attorney David P. York (Jan. 22, 2004). In the e-mails, petitioner made repeated and graphic threats against his ex-wife, his children, his ex-wife's new husband, her friends, and her mother; he recounted details of his efforts to track down his ex-wife; and he warned that his patience was wearing thin and he was about to act. J.A. 420-448.

In calculating petitioner's offense level under the Sentencing Guidelines, the PSR recommended several enhancements, including one premised on evidence that petitioner intended to carry out the threats in his e-mails. J.A. 407. The PSR also recommended against a downward adjustment to petitioner's offense level for acceptance of responsibility. J.A. 406. In support, the PSR noted that petitioner's cellmate had indicated that, while petitioner was detained following his arrest, he had solicited the cellmate to kill his ex-wife's new husband. *Ibid.* Based on that evidence, the PSR concluded that petitioner "continues to engage in, or attempt to engage in, criminal activity." *Ibid.*

In calculating petitioner's criminal history category, the PSR determined that several of his past crimes could not count toward his criminal history score. Those crimes included petitioner's 2001 violation of the order restraining him from contacting his ex-wife and their children. That conviction was not counted because petitioner had not been represented by counsel. J.A. 410. Petitioner's past abuse of his ex-wife and his attempt to hire someone to kill her new husband were also not included in his criminal history. See J.A. 407-411.

The PSR calculated petitioner's Guidelines sentencing range as 41 to 51 months of imprisonment. J.A. 415. The offense carried a statutory maximum of five years of imprisonment. *Ibid.* In a section entitled "Factors That May Warrant Departure," the PSR stated:

> Pursuant to Guideline 4A1.3 (Adequacy of Criminal History Category), the Court may consider whether or not the defendant's criminal history category adequately reflects the defendant's past criminal conduct or the likelihood that the defendant will commit other crimes. If not, the Court may consider imposing a sentence departing from the otherwise applicable guideline range.

J.A. 417.

Petitioner objected to the recommended enhancement based on his intent to carry out his threats, the denial of an acceptance of responsibility adjustment, and the PSR's description of his criminal history. J.A. 295-296, 300-301. The government had no objections to the PSR but gave notice that petitioner's ex-wife would testify at the sentencing hearing. J.A. 293.

5. In March 2005, the district court held petitioner's sentencing hearing. J.A. 298-380. Petitioner's ex-wife

testified that, during their marriage, petitioner had repeatedly abused and threatened her and their children. J.A. 305-310. She described how they had fled from California, where they lived with petitioner, to South Carolina, where she obtained a divorce and a restraining order. *Ibid.* She testified that petitioner was arrested in 2001 for violating the restraining order, after he drove cross-country in a van containing a hammer, rope, tarps, and duct tape, and showed up at her apartment in South Carolina. J.A. 321-322. She stated that she and the children then moved to Mobile, Alabama, where she remarried. J.A. 311-312. Nonetheless, she explained, petitioner continued to threaten her. He sent her 255 e-mails, many of which contained graphic threats to kill or injure her, the children, her new husband, her mother, and her friends. J.A. 312-314, 318. Petitioner also called his ex-wife's home in Mobile and sent her new husband a card with a Mobile postmark. J.A. 316-318. Petitioner's ex-wife testified that she was "certain" that petitioner was "bound and determined to kill, harm, or at minimum terrorize" her, her family, and her friends. J.A. 320. She told the court that petitioner "w[ould] not stop unless he [was] forced to stop," and she asked the court to "[p]lease force him to stop." *Ibid.*

An FBI agent also testified at the hearing. J.A. 323-333. The agent stated that, when petitioner was arrested, his automobile contained numerous items indicating his intent to track down his ex-wife and her family. J.A. 326-329. The agent testified that, after petitioner's arrest, he made violent threats against his ex-wife and others. J.A. 329-330. In particular, he stated that he intended "to shoot, car bomb, or decapitate [his ex-wife] and her family and to 'leave a trail of blood from here to Alabama' to protect his kids." J.A. 394.

Petitioner's cellmate also testified. J.A. 333-347. According to the cellmate, petitioner had stated that he intended to kill or to hire someone to kill his ex-wife's new husband. J.A. 336-338. The cellmate also testified that petitioner threatened to kidnap his children and to kill his ex-wife's mother, whom he blamed for his separation from his ex-wife. *Ibid.*

Petitioner testified at the sentencing hearing as well. J.A. 347-364. He denied many of the alleged incidents of past abuse. J.A. 360-362. He denied that he intended to carry out the threats he had made in the past or that his ex-wife and the children were "in any jeopardy" from him in the future. J.A. 354, 359, 361-362. He also denied his cellmate's claims. J.A. 356-357.

After hearing argument from counsel, the district court overruled petitioner's objections to the PSR. J.A. 370-372. The court found that petitioner "did in fact intend and does have a current intent" to carry out his threats. J.A. 371. And, in denying an adjustment for acceptance of responsibility, the court reiterated that petitioner "still intends to threaten and to terrorize [his ex-wife] by whatever means he can." J.A. 371-372.

Although the government requested a sentence at the high-end of the advisory Guidelines range, the district court sentenced petitioner to the statutory maximum of five years of imprisonment, nine months above the top of the range. J.A. 373-375. The court stated that it had concluded that "the guideline range [was] not appropriate" because the court was "sincerely convinced that [petitioner] w[ould] continue, as his ex-wife testified, in this conduct regardless of what this court does and regardless of what kind of supervision he's under." J.A. 374. Accordingly, the court concluded, "the maxi-

mum time" that petitioner could be "incapacitated" was "best for society." *Ibid.*

Petitioner objected that the court had not given notice of its intent to impose an "upward departure" from "the applicable guideline range." J.A. 377. The court overruled the objection, observing that petitioner was on "notice that the guidelines were only advisory and the court could sentence anywhere within the statutory range as defined by the United States Code." *Ibid.*

6. The court of appeals affirmed petitioner's sentence. J.A. 392-400. The court noted that Federal Rule of Criminal Procedure 32(h), which codified the holding in *Burns* v. *United States*, 501 U.S. 129 (1991), states that, before a sentencing court "may depart from the applicable sentencing range on a ground not identified for departure either in the [PSR] or in a party's prehearing submission, the court must give the parties reasonable notice that it is contemplating such a departure." J.A. 397 (quoting Fed. R. Crim. P. 32(h)). The court of appeals determined, however, that the above-Guidelines sentence in this case was "not a guidelines departure" but a "variance" (J.A. 398), based on the district court's consideration of the sentencing criteria in 18 U.S.C. 3553(a) (2000 & Supp. V 2005), "particularly the need to protect the public, including [petitioner's] ex-wife, from further crimes of [petitioner]." J.A. 400; see J.A. 399 (citing 18 U.S.C. 3553(a)(2)(C)).

The court of appeals then considered whether Rule 32's notice requirement applies "to a sentence set outside the advisory guidelines range based not on the guidelines' departure provisions, but on a district court's consideration of the section 3553(a) factors." J.A. 399. The court of appeals concluded that the notice requirement "does not apply to such variances." *Ibid.* The

court reasoned that, "[a]fter *Booker*, parties are inherently on notice that the sentencing guidelines range is advisory and that the district court must consider the factors expressly set out in section 3553(a) when selecting a reasonable sentence between the statutory minimum and maximum. Given *Booker*, parties cannot claim unfair surprise or inability to present informed comment—the Supreme Court's concerns in *Burns*—when a district court imposes a sentence above the guidelines range based on the section 3553(a) sentencing factors." J.A. 399-400 (internal citation omitted).

SUMMARY OF ARGUMENT

I. A. In *Burns* v. *United States*, 501 U.S. 129 (1991), this Court held that Federal Rule of Criminal Procedure 32 required the district court to provide notice before departing from the sentencing range specified by the Sentencing Guidelines on a ground not identified in the presentence report or the parties' submissions. In 2002, Rule 32 was amended to codify *Burns*. The amendment retained the language on which the Court had relied in *Burns*, see Fed. R. Crim. P. 32(i)(1)(C), and added a new subsection. That subsection provides that, "[b]efore the court may depart from the applicable sentencing range on a ground not identified for departure either in the presentence report or in a party's prehearing submission, the court must give the parties reasonable notice that it is contemplating such a departure. The notice must specify any ground on which the court is contemplating a departure." Fed. R. Crim. P. 32(h).

B. The notice requirement of Rule 32(h) applies to all deviations—*i.e.*, departures—from the Guidelines range, whether authorized by the Guidelines or Section 3553(a). The ordinary meanings of "depart" and "depar-

ture" include any variance or deviation. The Guidelines generally define a "departure" as the "imposition of a sentence outside the applicable guideline range or of a sentence that is otherwise different from the guidelines sentence," Guidelines § 1B1.1, comment. (n.1(E)), a definition that comfortably includes variances under Section 3553(a). And several courts have referred to Section 3553(a) variances as "departures"—including this Court, which has used the terms "departure" and "variance" interchangeably. As enacted, Rule 32(h) required notice of all available deviations from the Guidelines range, and it should be construed the same way today. Although only Guidelines-authorized departures were permissible when Rule 32(h) was enacted, courts may now also vary from the Guidelines based on Section 3553(a). Variances thus fall squarely within the plain meaning of the textual reference to departures. Accordingly, Rule 32(h) requires notice of Section 3553(a) variances.

C. That interpretation is supported by Federal Rule of Criminal Procedure 32(i)(1)(C), which gives the parties the right to comment on "matters relating to an appropriate sentence." In *Burns*, this Court reasoned that this right would be virtually meaningless without notice of *sua sponte* departures. 501 U.S. at 136. That reasoning applies with equal force to *sua sponte* variances. Like Guidelines departures, Section 3553(a) variances are "[o]bviously" matters relating to the appropriate sentence, and, "it makes no sense to impute to Congress an intent that a defendant have the right *to comment* on the appropriateness of a *sua sponte* [variance] but not the right *to be notified* that the court is contemplating such a ruling." *Id.* at 135-136.

D. For similar reasons, a notice requirement for variances is essential to advance Rule 32's purpose of

ensuring "focused, adversarial resolution of the legal and factual issues" relevant to sentencing. *Burns*, 501 U.S. at 137. Notice of variances is even more necessary to further this purpose than notice of departures, because the Section 3553(a) criteria embrace a wider array of factors than the grounds for departure under the Guidelines. In addition, a sentencing court can always use a Section 3553(a) variance to impose the same sentence that the court could have imposed as a Guidelines departure. Therefore, unless a court must provide notice of otherwise unanticipated grounds for variances, courts could bypass Guidelines departures and impose all non-Guidelines sentences as Section 3553(a) variances, with no notice. And, if a court imposed a Guidelines departure without giving notice, that error would often be harmless. Courts frequently impose non-Guidelines sentences both on traditional departure grounds and as Section 3553(a) variances, and a failure to give notice of a traditional departure would be harmless if the court would have imposed the same sentence under Section 3553(a).

E. Construing Rule 32 to mandate notice of variances would also have the salutary effect of eliminating the need for courts to consider whether notice would otherwise be required by due process. The question whether due process demands notice before a *sua sponte* variance from the advisory Guidelines range is less serious than the question in *Burns*, which involved a departure from a mandatory Guidelines range. Nonetheless, avoiding the issue provides further support for interpreting Rule 32 as mandating notice of variances.

F. None of the reasons courts have offered for limiting Rule 32 to Guidelines departures is persuasive. The fact that a Section 3553(a) variance is always possible

does not eliminate the need for notice. A notice requirement for variances also would not be unduly burdensome. Requiring notice of Section 3553(a) variances is also consistent with post-*Booker* sentencing, because the Guidelines, although advisory, continue to play a central role. And, finally, nothing in the text of Rule 32(h) limits its coverage to departures authorized by the Guidelines themselves.

II. Although the district court erred in imposing an above-Guidelines sentence without giving notice that it was contemplating a variance under Section 3553(a), that error was harmless.

A. This Court should reject petitioner's request that the Court not address the harmless-error issue. The issue is properly presented, and the Court has addressed harmlessness questions in the past. Resolving the issue here will not be overly burdensome and will provide important guidance to the lower courts.

B. Petitioner is not correct that the Court must decide whether notice is required by due process in order to decide the harmless-error issue. The district court's violation of Rule 32 was non-constitutional error, subject to the harmless-error standard of *Kotteakos* v. *United States*, 328 U.S. 750 (1946). That standard applies whether or not the district court also violated due process. Petitioner has never raised a due process claim. And only a separate due process claim, if properly preserved and decided in petitioner's favor, would be reviewed under the more demanding harmless-error standard of *Chapman* v. *California*, 386 U.S. 18 (1967).

C. In any event, the notice deficiency was harmless under both the *Kotteakos* and *Chapman* standards. The district court varied upwards to protect the public from further crimes by petitioner. Although the court did not

give notice that it might vary on that ground, petitioner had notice that the likelihood that he would commit further crimes would be a central issue at sentencing and might support an above-Guidelines sentence. There is no reason to believe that petitioner's sentencing presentation would have been materially different if he had received notice that his future dangerousness might also be considered as the basis for a variance.

D. For the first time in this Court, petitioner claims that, with more specific notice, he would have presented expert testimony that his criminal conduct was the product of a delusional disorder that could be successfully treated. That evidence would not have affected petitioner's sentence. Petitioner made essentially the same argument at sentencing, although he chose not to present expert testimony, which petitioner concedes was "available." Pet. Br. 32-33. Moreover, the district court had already rejected the defense expert's diagnosis that petitioner was delusional. Finally, the evidence at sentencing showed that petitioner had repeatedly refused psychiatric medication and was "not motivated to engage in any treatment." Butner FMC Report 14.

ARGUMENT

I. RULE 32 REQUIRES A DISTRICT COURT TO PROVIDE NOTICE BEFORE VARYING UNDER 18 U.S.C. 3553(a) FROM THE SENTENCING GUIDELINES RANGE BASED ON A GROUND NOT IDENTIFIED IN THE PRESENTENCE REPORT OR THE PARTIES' SUBMISSIONS

Federal Rule of Criminal Procedure 32 requires a district court to provide notice before sentencing outside the range recommended by the Sentencing Guidelines on a ground not previously identified by the presentence report or the parties. That requirement applies to any

deviation from the Guidelines range, whether characterized as a Guidelines departure or a variance under 18 U.S.C. 3553(a) (2000 & Supp. V 2005). The district court therefore erred when it sentenced petitioner above the Guidelines range based on Section 3553(a) without first providing notice.

A. Rule 32(h), Which Codifies The Holding Of *Burns*, Requires Notice Before A *Sua Sponte* "Departure" From The Applicable Guidelines Range

Rule 32 establishes formal sentencing procedures to ensure "focused, adversarial resolution" of the issues central to selecting an appropriate sentence. *Burns* v. *United States*, 501 U.S. 129, 137 (1991). Those procedures generally require preparation of a presentence report (PSR) that sets out the principal legal and factual issues bearing on the sentence. Fed. R. Crim. P. 32(c). The PSR must include the sentencing range recommended by the Guidelines and "identify any basis for departing from" that range. Fed. R. Crim. P. 32(d). The parties must receive copies of the PSR before the sentencing hearing and may file objections to the PSR's factual findings and sentencing recommendations. Fed. R. Crim. P. 32(e) and (f).

In *Burns*, this Court construed an earlier version of Rule 32 to require the sentencing court to give the parties notice before departing from the Guidelines range on a ground that had not been identified by the PSR or the parties' prehearing submissions. 501 U.S. at 138-139. The Court held that notice was implicitly required by Rule 32's mandate that the parties have "an opportunity to comment upon the [PSR] and on other matters relating to the appropriate sentence." *Id.* at 135 (quoting Fed. R. Crim. P. 32(a)(1) (1991)). The Court rea-

soned that, if notice of *sua sponte* departures were not required, the right to comment on those departures, which are "[o]bviously" matters relating to an appropriate sentence, would be "meaningless." *Id.* at 135-136. The Court also reasoned that notice is critical to Rule 32's "purpose of promoting focused, adversarial resolution of the legal and factual issues" relevant to sentencing. *Id.* at 137. Additionally, the Court relied on the principle of constitutional avoidance, explaining that, if it "read Rule 32 to dispense with notice, [the Court] would then have to confront the serious question whether notice in this setting is mandated by the Due Process Clause." *Id.* at 138.

In 2002, Rule 32 was amended to "reflect[]" the decision in *Burns*. Fed. R. Crim. P. 32 advisory committee's notes (2002 Amends.). The amendment retained (with non-substantive revisions) the language on which the Court relied in *Burns* and moved that language to a new subsection, Fed. R. Crim. P. 32(i)(1)(C). The amendment also added Rule 32(h), entitled "Notice of Possible Departure from Sentencing Guidelines." Rule 32(h) states that, "[b]efore the court may depart from the applicable sentencing range on a ground not identified for departure either in the [PSR] or in a party's prehearing submission, the court must give the parties reasonable notice that it is contemplating such a departure. The notice must specify any ground on which the court is contemplating a departure." Fed. R. Crim. P. 32(h).

When Rule 32(h) was enacted, the Guidelines were viewed as mandatory. District courts could deviate from the Guidelines sentencing range only under limited circumstances described in 18 U.S.C. 3553(b) (2000 &

Supp. V 2005).[2] The Guidelines contain various provisions detailing when departures are authorized in accordance with that limitation. See Guidelines § 4A1.3, Ch. 5, Pts. H and K (2004). Subsequently, however, this Court decided *United States* v. *Booker*, 543 U.S. 220 (2005), which rendered the Guidelines advisory. Under *Booker*, although the Guidelines continue to play an important role in sentencing, district courts may deviate from the Guidelines range not only when authorized by the Guidelines themselves but also when warranted by the criteria in Section 3553(a). *Booker*, 543 U.S. at 245.

B. The Term "Departure" Encompasses All Deviations From The Guidelines Range, Whether Authorized By The Guidelines Or By Section 3553(a)

After *Booker*, Rule 32's requirement that a district court provide notice before a *sua sponte* "departure" from the Guidelines range is best construed to encompass a deviation from that range authorized by Section 3553(a) as well as a deviation authorized by the Guidelines themselves.

1. The words "depart" and "departure" in Rule 32(h) are best read to encompass all deviations from the Guidelines range, whether authorized by the Guidelines themselves or by Section 3553(a). The ordinary meaning of "depart" is to "deviate" or to "vary, as from a regular course." *Webster's Third New International Dictionary*

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[2] Section 3553(b)(1) states that the sentencing court "shall" impose a sentence within the Guidelines range "unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the Guidelines that should result in a sentence different from that described." 18 U.S.C. 3553(b)(1) (Supp. V 2005).

of the English Language 604 (1993); *The American Heritage Dictionary of the English Language* 501 (3d ed. 1992); see *Webster's New International Dictionary* 700 (2d ed. 1958) ("deviate"). A "departure" is a "divergence or deviation, as from an established rule, plan, or procedure." *Ibid.*; see *Random House Dictionary of the English Language* 534 (2d ed. 1987). Accordingly, under the plain meaning of the terms "depart" and "departure" in Rule 32(h), a court must give notice whenever it deviates on its own initiative from the applicable Guidelines range, regardless of whether the deviation is authorized by the Guidelines or the broader Section 3553(a) criteria. *United States* v. *Cousins*, 469 F.3d 572, 580 (6th Cir. 2006); *United States* v. *Evans-Martinez*, 448 F.3d 1163, 1167 (9th Cir. 2006).

2. The Guidelines support that understanding of the rule. The Guidelines did not contain a definition of "departure" when Rule 32(h) was enacted. But the Sentencing Commission added its own definition to the Guidelines shortly thereafter. See Guidelines App. C, Amend. 651, Reason for Amend. (Oct. 27, 2003). Under that definition, "departure" generally means "imposition of a sentence outside the applicable guideline range or of a sentence that is otherwise different from the guideline sentence." Guidelines § 1B1.1, comment. (n.1(E)). A non-Guidelines sentence based on the Section 3553(a) factors is clearly a "sentence outside the applicable guideline range" or "a sentence that is otherwise different from the guideline sentence." A deviation from the Guidelines under Section 3553(a) thus fits comfortably within the Guidelines definition of "departure."[3]

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[3] The Guidelines provide a more specific definition of "departure" for purposes of Guidelines § 4A1.3. For that provision, departure means

Although the Guidelines define "departure" broadly, they authorize only certain types of departures—those based on "an aggravating or mitigating circumstance * * * of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines," Guidelines § 5K2.0(a)(1); those based on the defendant's provision of "substantial assistance" to the government, Guidelines § 5K1.1; and those based on a conclusion that "the defendant's criminal history category substantially under-represents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes," Guidelines § 4A1.3(a)(1). When Rule 32(h) was enacted, the Guidelines were mandatory, and those categories of departures were therefore the only ones that were legally authorized. Likewise, they were the only departures for which Rule 32(h) would have required notice. But that does not mean that Rule 32(h) should be construed as limited to those departures now that the Guidelines are advisory and courts have additional bases for sentencing outside the Guidelines range. Cf. *Riegel* v. *Medtronic, Inc.*, 128 S. Ct. 999, 1011-1012 (2008) (Stevens, J., concurring) (finding express preemption in circumstances not envisioned by drafters of preempting provision).

On the contrary, because Rule 32(h) required notice of all sentences outside the presumptively applicable Guidelines range when it was enacted, this Court should give it a comparably comprehensive construction today.

"assignment of a criminal history category other than the otherwise applicable criminal history category, in order to effect a sentence outside the applicable guideline range." Guidelines § 1B1.1, comment. (n.1(E)). That definition is, by its terms, not relevant to non-Guidelines sentences under Section 3553(a).

Rule 32(h) should be read to require notice of any sentence outside the Guidelines range, whether resting on a Guidelines departure factor or the broader set of considerations embraced by Section 3553(a). It may be that, in some cases, like this one, the factors on which the district court varies will be disputed by the parties even absent notice of the potential variance, but that is no reason not to give Rule 32(h) its full scope. That was true in some cases before *Booker*, and, even after *Booker*, courts may deviate based on factors very different from those on which the parties focus.

3. Although the term "departure" in Rule 32(h) is broad enough to encompass non-Guidelines sentences based on Section 3553(a), the government has generally used the term "variance" to refer to those sentences, and it has reserved the term "departure" for deviations authorized by the Guidelines themselves. Several courts of appeals have also adopted that terminology. See, *e.g.*, *United States* v. *Vampire Nation*, 451 F.3d 189, 195 n.2 (3d Cir.), cert. denied, 127 S. Ct. 424 (2006) (citing *United States* v. *Sitting Bear*, 436 F.3d 929, 932-933 (8th Cir. 2006)). That terminology, however, developed only as a convenient way to differentiate the two processes for sentencing outside the Guidelines range. "Variance" is not defined in any statute or rule. The government and the courts could just as easily have called Section 3553(a) variances "non-Guidelines departures." In fact, several courts of appeals have referred to them that way. See, *e.g.*, *Cousins*, 469 F.3d at 577; *United States* v. *Calzada-Maravillas*, 443 F.3d 1301, 1304 (10th Cir. 2006).

In addition, this Court has frequently used the term "departure" to refer to any sentence outside the Guidelines range, including a variance on Section 3553(a)

grounds. See, *e.g.*, *Rita* v. *United States*, 127 S. Ct. 2456, 2464 (2007) (noting that district courts "may depart (either pursuant to the Guidelines or, since *Booker*, by imposing a non-Guidelines sentence)"); *Gall* v. *United States*, 128 S. Ct. 586, 594, 595 (2007) (repeatedly using "departure" to refer to a Section 3553(a) variance). Likewise, the Court has often used the words "departure," "variance," and "deviation" interchangeably to refer to a sentence outside the Guidelines range imposed under Section 3553(a). See, *e.g.*, *id.* at 594-595 ("In reviewing the reasonableness of a sentence outside the Guidelines range, appellate courts may therefore take the degree of *variance* into account and consider the extent of a *deviation* from the Guidelines. We reject, however, an appellate rule that requires 'extraordinary' circumstances to justify a sentence outside the Guidelines range. We also reject the use of a rigid mathematical formula that uses the percentage of a *departure* as the standard for determining the strength of the justifications required for a specific sentence.") (emphases added); *id.* at 597 ("If [the district judge] decides that an outside-Guidelines sentence is warranted, he must consider the extent of the *deviation* and ensure that the justification is sufficiently compelling to support the degree of the *variance*. We find it uncontroversial that a major *departure* should be supported by a more significant justification than a minor one.") (emphases added). Thus, Section 3553(a) variances are readily understood to be "departure[s]" covered by the notice requirement of Rule 32(h).[4]

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[4] Interpreting the term "departure" to include Section 3553(a) variances is also consistent with the use of that term elsewhere in Rule 32. Rule 32(d)(1)(E) provides that the PSR must "identify any basis for departing from the applicable sentencing range." Fed. R. Crim. P.

C. A Notice Requirement Is Also Supported By Rule 32(i)(1)(C), Which Mandates That The District Court Allow The Parties To Comment On "Matters Relating To An Appropriate Sentence"

In *Burns*, this Court concluded that it had to read Rule 32 to require notice of *sua sponte* departures because a contrary reading would "render[] meaningless the parties' express right 'to comment upon . . . matters relating to the appropriate sentence,'" 501 U.S. at 136 (quoting Fed. R. Crim. P. 32(a)(1) (1991)). The Court's reasoning in *Burns* applies with equal force to *sua sponte* variances under Section 3553(a).

Rule 32 continues to give the parties the right "to comment on * * * matters relating to an appropriate sentence." Fed. R. Crim. P. 32(i)(1)(C). Like Guidelines departures, Section 3553(a) variances are "[o]bviously" matters relating to the appropriate sentence. *Burns*, 501 U.S. at 135. And "it makes no sense to impute to Congress an intent that a defendant have the right *to comment* on the appropriateness of a *sua sponte* departure [or variance] but not the right *to be notified* that the court is contemplating such a ruling." *Id.* at 135-136. "'Th[e] right to be heard has little reality or worth unless one is informed' that a decision is contemplated." *Id.* at 136 (citation omitted; brackets in original). Moreover, there is "essentially no limit on the number of potential factors that may warrant" a non-Guidelines sen-

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32(d)(1)(E). It is entirely appropriate to interpret that provision as requiring the PSR to identify grounds for departing under Section 3553(a), as well as under the Guidelines. In fact, after *Booker*, PSRs frequently do just that. See, *e.g.*, *United States* v. *Fancher*, 513 F.3d 424, 425-426 (4th Cir. 2008); *United States* v. *Korson*, 243 Fed. Appx. 141, 143 (6th Cir. 2007); *United States* v. *Hernandez-Felix*, No. 07-10052, 2007 WL 4292110, at *1 (9th Cir. Dec. 5, 2007).

tence under Section 3553(a). *Ibid.* Accordingly, "no one is in a position to guess when or on what grounds a district court might" choose to impose a non-Guidelines sentence, "much less to 'comment' on such a possibility in a coherent way." *Id.* at 137. Requiring advance notice of Section 3553(a) variances thus gives meaning to the right to comment on the decision whether to impose a non-Guidelines sentence. *United States* v. *Anati*, 457 F.3d 233, 236 (2d Cir. 2006).

D. Notice Of All *Sua Sponte* Deviations From The Guidelines Range Is Necessary To Achieve The Purposes Of Rule 32

1. For similar reasons, notice of Section 3553(a) variances is essential to advance the purposes of Rule 32. As this Court explained in *Burns*, Rule 32 seeks to provide "focused, adversarial resolution of the legal and factual issues" relevant to sentencing. *Burns*, 501 U.S. at 137. Rule 32(h) reflects a judgment that the parties cannot meaningfully present evidence and argument on sentencing outside the Guidelines range unless they have notice of the grounds on which the district court is contemplating that it might impose a non-Guidelines sentence. The need for notice is also substantial for Section 3553(a) variances. *United States* v. *Atencio*, 476 F.3d 1099, 1104 (10th Cir. 2007) (en banc).

Burns explains that, absent notice, the parties would be forced to address "possible *sua sponte* departures in a random and wasteful way by trying to anticipate and negate every conceivable ground on which the district court might choose to depart on its own initiative." 501 U.S. at 137. That problem is even more apt to occur if the parties do not have notice of Section 3553(a) variances because the Section 3553(a) criteria are broader

than the grounds for departure under the Guidelines. Compare 18 U.S.C. 3553(a) (2000 & Supp. V 2005) with Sentencing Guidelines § 4A1.3, Ch. 5, Pts. H and K. Moreover, as with *sua sponte* Guidelines departures, "in every case in which the parties fail to anticipate an unannounced and uninvited" Section 3553(a) variance, "a critical sentencing determination will go untested by the adversarial process contemplated by Rule 32." *Burns*, 501 U.S. at 137.

To be sure, that problem is not evident in this case from an *ex post* perspective. The ground on which the district court varied was subject to adversarial dispute both because it was relevant to sentencing within the Guidelines range and because the PSR raised the possibility of a Guidelines departure on a similar ground. See pp. 41-45, *infra*. But there is a potential problem *ex ante* in this and every case, because the parties have no way to know which of the virtually limitless grounds for variance the sentencing judge thinks are relevant.

In *Rita*, this Court recently reaffirmed the continuing importance of the adversarial process in the advisory Guidelines regime. The Court observed that, before a district court decides that a "Guidelines sentence should not apply"—either because a departure is authorized by "the Guidelines themselves" or because the Guidelines sentence "fails properly to reflect § 3553(a) factors"—the court must conduct "the thorough adversarial testing contemplated by federal sentencing procedure." *Rita*, 127 S. Ct. at 2465. In making that point, the Court cited Rule 32(h) and (i)(1)(C), as well as *Burns*, for the "importance of notice and meaningful opportunity to be heard." *Ibid.* *Rita* thus confirms that the notice requirement necessary for the adversarial testing of sentencing issues applies to any sentence outside the Guide-

lines range, whether achieved through a Guidelines departure or a Section 3553(a) variance.

2. A notice requirement for Section 3553(a) variances is critical to prevent evisceration of Rule 32(h)'s notice requirement for Guidelines departures. As described above, the grounds for varying under Section 3553(a) are even broader than the justifications for departing under the Sentencing Guidelines. A sentencing court therefore can always use a Section 3553(a) variance to impose the same sentence that the court could have imposed as a Guidelines departure. See *United States* v. *Smith*, 474 F.3d 888, 893 (6th Cir. 2007); *United States* v. *Mohamed*, 459 F.3d 979, 987 (9th Cir. 2006). Because a Section 3553(a) variance can always substitute for a Guidelines departure, Rule 32(h)'s notice requirement for Guidelines departures would be essentially meaningless if Rule 32 did not also require notice of Section 3553(a) variances.

In light of the functional overlap between variances and Guidelines departures, district courts often rely solely on Section 3553(a) when imposing non-Guidelines sentences, without considering whether the Guidelines would authorize a departure. See, *e.g.*, *United States* v. *Mejia-Huerta*, 480 F.3d 713, 716-719 (5th Cir. 2007), petition for cert. pending, No. 06-1381 (filed Apr. 18, 2007); *United States* v. *Levine*, 477 F.3d 596, 606 (8th Cir.), cert. denied, 127 S. Ct. 3023 (2007). Indeed, two circuits have held that Guidelines departures are obsolete after *Booker*. See *Mohamed*, 459 F.3d at 986; *United States* v. *Walker*, 447 F.3d 999, 1006 (7th Cir.), cert. denied, 127 S. Ct. 314 (2006). In those circuits, district courts routinely vary under Section 3553(a) without addressing the possibility of a Guidelines departure.

See, *e.g.*, *United States* v. *Santiago*, 495 F.3d 820, 823 (7th Cir. 2007); *United States* v. *Orosco-Cortez*, No. 06-50270, 2008 WL 162998, at *1 (9th Cir. Jan. 18, 2008). If a court were free to vary under Section 3553(a) on an unanticipated ground that paralleled a traditional departure factor without giving any notice, the parties would face sentencing by surprise—even though notice would have been required if the court had imposed the same sentence as a Guidelines departure. See, *e.g.*, *Mejia-Huerta*, 480 F.3d at 723-724; *Levine*, 477 F.3d at 606.[5]

In many other cases, district courts fail to give notice before imposing a non-Guidelines sentence and do not specify whether the deviation is based on a Guidelines departure or a Section 3553(a) variance. For example, in fiscal year 2007, district courts imposed approximately 8535 sentences outside the applicable Guidelines range on grounds other than government-sponsored downward departures. In 8.3% of those cases, the courts failed to specify whether they were relying on a Guidelines departure or a Section 3553(a) variance. See United States Sentencing Comm'n, *Preliminary Quarterly Data Report, Fourth Quarter Release, Preliminary Fiscal Year 2007 Data*, Table 1, at 1, http://www.ussc.gov/sc_cases/ Quarter_Report_4th_07.pdf (visited Mar. 19, 2008) (*2007 Sentencing Data*). If there were no

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[5] Indeed, because it has declared Guidelines departures "obsolete" after *Booker*, the Seventh Circuit has held that Rule 32(h) no longer "has *any* continuing application." *Walker*, 447 F.3d at 1006 (emphasis added). The position that traditional Guidelines departures are "obsolete" is incorrect. Section 3553(a) requires courts to consider "any pertinent policy statement * * * issued by the Sentencing Commission," 18 U.S.C. 3553(a)(5) (Supp. V 2005), and this Court has recognized that the parties may "argue *within the Guidelines framework*, for a departure from the applicable Guidelines range." *Rita*, 127 S. Ct. at 2461; see *id.* at 2464, 2465.

notice requirement for variances, many of those sentences would be likely upheld as variances on appellate review, despite the absence of advance notice of the deviation from the Guidelines range. Cf. *United States* v. *Morris*, 228 Fed. Appx. 906, 907-908 (11th Cir. 2007); *United States* v. *Moton*, 226 Fed. Appx. 936, 937 (11th Cir. 2007).

In an even larger number of cases, district courts rely on both a Guidelines departure and a Section 3553(a) variance, as alternative grounds, to justify a non-Guidelines sentence. See, *e.g.*, *United States* v. *Coughlin*, 500 F.3d 813, 819 (8th Cir. 2007); *United States* v. *Bradford*, 461 F. Supp. 2d 904, 928-929 (N.D. Iowa 2006), aff'd, 499 F.3d 910 (8th Cir. 2007), cert. denied, No. 07-7829 (Feb. 25, 2008). For example, in fiscal year 2007, courts relied on both grounds to justify almost 12% of the 8535 non-Guidelines sentences. *2007 Sentencing Data* Table 1, at 1. Unless there were a notice requirement for variances, a district court's failure to give notice before imposing a Guidelines departure would be harmless error any time that the court relied on Section 3553(a) as an alternative ground.

Even more troubling, if a district court recognized that it could not lawfully depart under the Guidelines because it had failed to give notice, it could still impose the same sentence under Section 3553(a). Absent a notice requirement for variances, the court would not be committing error at all. Cf. *United States* v. *Flanders*, 491 F.3d 1197, 1220-1221 (10th Cir. 2007). Thus, unless Rule 32 is construed to require notice of Section 3553(a) variances, Rule 32(h)'s requirement that courts provide notice of Guidelines departures will have little, if any, continuing force.

E. Construing Rule 32 To Mandate Notice Of Variances Would Enable Courts To Avoid Considering Whether Notice Is Required By Due Process

Interpreting Rule 32 to mandate notice of variances would also eliminate the need for courts to decide whether notice would otherwise be required by the Due Process Clause. In *Burns*, this Court held that there was a "serious" question whether due process required notice before a *sua sponte* departure from the mandatory Guidelines range. 501 U.S. at 138. The Court therefore concluded that the principle of constitutional avoidance required it to construe Rule 32 as mandating notice. *Ibid.* Although the question whether due process demands notice before a *sua sponte* variance from the advisory Guidelines range is substantially less serious than the due process issue in *Burns*, interpreting Rule 32 as requiring notice of variances obviates any need for the courts to address the constitutional issue.

In the mandatory Guidelines regime that prevailed when the Court decided *Burns*, a defendant had a legal right to a sentence within the Guidelines range unless there were grounds described in Section 3553(b) that justified a departure. There was therefore a substantial basis for believing that notice of a possible departure was essential to protect that legal right against erroneous deprivation. See *Burns*, 501 U.S. at 138; *id.* at 146-156 (Souter, J., dissenting) (considering but rejecting that argument). After *Booker*, the defendant no longer has a legal right to a Guidelines sentence absent a valid departure ground. Instead, the defendant may only challenge the reasonableness of his sentence on appeal under a deferential abuse-of-discretion standard. See *Booker*, 543 U.S. at 260-261; *Gall*, 128 S. Ct. at 597. Notice that the court is contemplating a non-Guidelines

sentence will help achieve the most appropriate sentence, especially in cases in which the grounds for the variance differ from the considerations governing the applicable within-range sentence. But such notice is not essential to ensure a reasonable sentence, let alone required by due process. See *United States* v. *Ausburn*, 502 F.3d 313, 324-327 (3d Cir. 2007), petition for cert. pending, No. 07-9534 (filed Feb. 19, 2008); *Greenholtz* v. *Inmates of the Neb. Penal & Corr. Complex*, 442 U.S. 1, 14 n.6 (1979) (due process does not require parole board to give notice of the factors it will consider in making a discretionary decision whether to grant parole).

Nonetheless, reading Rule 32 to require notice of variances best comports with its language and purposes. And giving the rule that meaning also eliminates any need to address the due process issue, which at least one court has already had to confront. See *Ausburn*, 502 F.3d at 324-327. That salutary result further supports construing Rule 32 to require notice of all deviations from the Guidelines range, including Section 3553(a) variances.

F. The Arguments For Limiting Rule 32 To Guidelines Departures Are Not Persuasive

The courts of appeals that have read Rule 32 as requiring notice only of Guidelines departures have offered essentially four reasons in support of their interpretation. None of those reasons is persuasive.

1. The fact that a Section 3553(a) variance is always possible does not eliminate the need for notice

Courts that have refused to read Rule 32 as covering Section 3553(a) variances have primarily reasoned that the parties are "inherently on notice" of the Section 3553(a) factors and know that the district court will con-

sider those factors in sentencing. J.A. 399-400. Those courts have concluded that there is therefore no danger of "unfair surprise or inability to present informed comment," the concerns that motivated this Court's decision in *Burns*. J.A. 400; *e.g.*, *Mejia-Huerta*, 480 F.3d at 722. That reasoning is flawed.

When *Burns* was decided, the parties were "equally aware of the specified circumstances for departure under the Guidelines." *Atencio*, 476 F.3d at 1104. Nonetheless, this Court held that this generalized notice was insufficient to satisfy Rule 32's purpose of promoting the "focused, adversarial resolution" of the issues relevant to sentencing because "no one is in a position to guess when or on what grounds a district court might depart." *Burns*, 501 U.S. at 137. The Court's reasoning applies just as forcefully to Section 3553(a) variances. Indeed, the potential for surprise is even more pronounced for variances, because courts have much greater freedom to vary under Section 3553(a) than to depart under the Guidelines. Section 3553(a) permits a court to vary based on policy considerations and factors that the Guidelines may have put off-limits. See *Kimbrough* v. *United States*, 128 S. Ct. 558 (2007). Accordingly, parties have, if anything, less ability to anticipate the basis for a *sua sponte* variance than a traditional departure. See *United States* v. *Davenport*, 445 F.3d 366, 371 (4th Cir. 2006). Although there may be cases, like this one, where the ultimate ground for a variance is little different from the disputed issues relevant to the appropriate sentence within the Guidelines range, that potential does little to help the parties *ex ante*. The greater number of potential grounds for variances puts a premium on notice of the factors that the sentencing judge believes to be relevant.

2. Requiring notice of Section 3553(a) variances is not unduly burdensome

Courts rejecting a notice requirement for variances have also expressed concern that requiring notice would be "unworkable" because a district court often will not know until the sentencing hearing itself that the court believes a non-Guidelines sentence is appropriate. *Vampire Nation*, 451 F.3d at 197; *United States* v. *Vega-Santiago*, No. 06-1558, 2008 WL 451813, at * 3 (1st Cir. Feb. 21, 2008) (en banc). That concern is unfounded.

The notice requirement for *sua sponte* Section 3553(a) variances will apply in relatively few cases. Rule 32(d)(1)(E) requires the PSR to identify any ground for imposing a non-Guidelines sentence. See note 4, *supra*. The United States Attorneys Offices inform us that, in the vast majority of cases in which a district court imposes a sentence outside the Guidelines range, the grounds for the variance have previously been identified by the PSR or the parties. Moreover, district courts will not be unduly burdened by providing notice in those rare cases in which the possible variance has not already been identified. Judges routinely review the PSR and other materials in advance of the sentencing hearing and "will already have a developed view of what the appropriate sentence is, including its length." *Vega-Santiago*, 2008 WL 451813, at *11 (Lipez, J., dissenting). Although the judge's views may be altered by the evidence and argument at the hearing, the "judge will almost always have considered in advance of the hearing whether an upward or downward variance is appropriate." *Ibid.* And, of course, if the hearing causes the judge to believe that a previously unacknowledged issue might warrant

a sentence outside the Guidelines range, that is precisely the situation when notice is critical.

Rule 32 does not impose a rigid requirement that notice be provided before the sentencing hearing. *Burns* "left open the possibility that the notice requirement might be met simply by notice at the hearing" itself. *United States* v. *Patrick*, 988 F.2d 641, 646 n.7 (6th Cir.), cert. denied, 510 U.S. 845 (1993). Accordingly, Rule 32 requires only that the notice be "reasonable." Fed. R. Crim. P. 32(h). Although some courts have concluded that prehearing notice is always required, see, *e.g.*, *Calzada-Maravillas*, 443 F.3d at 1304, that conclusion is not correct. Whether the sentencing court has provided "reasonable" notice depends on whether the notice allows the parties to comment meaningfully on the appropriateness of the departure or variance. See *United States* v. *Meeker*, 411 F.3d 736, 745 (6th Cir. 2005). The answer to that inquiry is necessarily "context-specific," *id.* at 744, and "will vary from case to case," *United States* v. *Reynoso*, 254 F.3d 467, 474 (3d Cir. 2001).

In many cases, notice provided at the sentencing hearing will be "reasonable," especially if other, related sentencing issues have been sufficiently developed. See, *e.g.*, *United States* v. *Hildebrand*, 152 F.3d 756, 766 (8th Cir.) (rejecting claim that court could not base upward departure in part on defendant's lack of remorse in his allocution when court had given notice that it was contemplating departure on other grounds), cert. denied, 525 U.S. 1033 (1998)). In other cases, a short recess of the hearing will be sufficient to provide the necessary notice. See *United States* v. *Nappi*, 243 F.3d 758, 765 (3d Cir. 2001). Although more time may be needed in some cases—particularly where the contemplated basis

for variance brings into play factual issues that have not previously been ventilated—the importance of fully airing the issues critical to sentencing justifies continuing the hearings in those cases.

*3. Requiring notice of Section 3553(a) variances is consistent with the role of the Guidelines in post-*Booker *sentencing*

Courts rejecting a notice requirement for variances have also reasoned that it would improperly "re-elevate the Guidelines to a position [they] no longer enjoy[]." *Mejia-Huerta*, 480 F.3d at 723; *e.g.*, *Vampire Nation*, 451 F.3d at 196. That reasoning misunderstands both the role of the Guidelines in post-*Booker* sentencing and the impact that a notice requirement would have on a district court's sentencing decision.

Even after *Booker*, the Guidelines play a critical role in sentencing. As this Court has explained, "the Guidelines should be the starting point and the initial benchmark" for all sentencing decisions. *Gall*, 128 S. Ct. at 596. "Where the judge imposes a sentence outside the Guidelines, the judge will explain why he has done so." *Rita*, 127 S. Ct. at 2468; see 18 U.S.C. 3553(c)(2) (Supp. V 2005) (requiring district court to state "the specific reason" for a non-Guidelines sentence). The court "must give serious consideration to the extent of any departure from the Guidelines," *Gall*, 128 S. Ct. at 594, and "ensure that the justification is sufficiently compelling to support the degree of the variance," *id.* at 597. On review, the court of appeals may apply a presumption of reasonableness to a sentence "that reflects a proper application of the Sentencing Guidelines." *Rita*, 127 S. Ct. at 2462. When reviewing a non-Guidelines sentence, "appellate courts may * * * take the degree of vari-

ance into account and consider the extent of a deviation from the Guidelines." *Gall*, 128 S. Ct. at 595.

The continuing importance of the Guidelines is evidenced by the fact that, in fiscal year 2007, 82% of all sentences fell within the Guidelines range (excluding government-sponsored downward departures). *2007 Sentencing Data* Table 1, at 1. Because the Guidelines remain central to the sentencing process, it remains entirely appropriate to require that the district court give the parties notice before imposing a non-Guidelines sentence based on grounds not previously identified. See *Anati*, 457 F.3d at 237.

Requiring notice will not cause district courts to impose within-Guidelines sentences when they otherwise would have varied from the Guidelines range. Before deciding that a variance is warranted, a judge will have carefully considered the Guidelines range and decided that "specific reasons" justify a non-Guidelines sentence. 18 U.S.C. 3553(c)(2) (Supp. V 2005). It is "inconceivable" that a judge who has reached that conclusion "would suppress that independent judgment" to avoid "[t]he modest burden of preparing a brief notice or, in the rare case, continuing an already convened sentencing hearing to a later date." *Vega-Santiago*, 2008 WL 451813, at *12 (Lipez, J., dissenting).

4. Rule 32(h)'s reference to "departure" is not limited to departures authorized by the Guidelines

Courts that have read Rule 32 as requiring notice of only Guidelines departures have also mistakenly relied on the "plain language" of Rule 32(h), noting that it "limits its application to *departures*." *Mejia-Huerta*, 480 F.3d at 722; see *Walker*, 447 F.3d at 1005. Some courts have assumed without analysis that a Section

3553(a) variance does not qualify as a "departure." See, *e.g.*, *Mejia-Huerta*, 480 F.3d at 722. As explained above, that assumption is unfounded. The ordinary meaning of "departure" is broad enough to include any deviation from the applicable Guidelines range, including a Section 3553(a) variance. Several courts have used the term "departure" to include variances, and this Court has used the terms "departure" and "variance" interchangeably. See pp. 21-22, *supra*.

The First Circuit in *Vega-Santiago* cited the Guidelines definition of "departure" in support of its holding that Rule 32(h) does not apply to Section 3553(a) variances. 2008 WL 451813, at *1. But the court did not quote the Guidelines language or offer any explanation of why the Guidelines definition does not encompass Section 3553(a) variances. In fact, as described above, the Guidelines define "departure" as any "sentence outside the applicable guideline range," Guidelines § 1B1.1, comment. (n.1(E)), an expansive definition that includes Section 3553(a) variances.

The term "departure" is also used in various statutory provisions that were enacted after Rule 32(h). See 18 U.S.C. 3553(b)(2), 3742(f)(2), (g)(2)(B) and (j), 5037(c)(1)(b), (2)(A)(ii) and (B)(ii) (Supp. V 2005). If those provisions were construed to encompass only Guidelines departures, they could not be reconciled with *Booker* and would have to be severed to avoid Sixth Amendment violations. See, *e.g.*, 18 U.S.C. 3742(g)(2) (Supp. V 2005) (stating that, on certain remands for resentencing, "[t]he court shall not impose a sentence outside the applicable guidelines range except upon a ground that–(A) was specifically and affirmatively included in the written statement of reasons required by section 3553(a) in connection with the previous sentenc-

ing of the defendant prior to the appeal; and (B) was held by the court of appeals, in remanding the case, to be a permissible ground of departure"). It may be, however, that one or more of the provisions can be read, like Rule 32, to encompass all non-Guidelines sentences, including variances. Whether any of the statutory provisions should be construed that way—and whether they would be consistent with *Booker* if they were so construed—depends on the particular context of each provision.

The ultimate interpretation of the statutory provisions will not, however, alter the correct interpretation of Rule 32. Nothing in the context of Rule 32 restricts its coverage to Guidelines departures; its language readily covers all non-Guidelines sentences; and that is the only construction that advances the rule's purposes. Accordingly, whatever "departure" means in the various statutory provisions, in Rule 32 the term includes all deviations from the Guidelines range, whether authorized by the Guidelines themselves or Section 3553(a).

II. THE DISTRICT COURT'S FAILURE TO GIVE NOTICE BEFORE VARYING FROM THE GUIDELINES RANGE WAS HARMLESS ERROR

Although the district court erred by imposing an above-Guidelines sentence without giving notice that it was contemplating a variance under Section 3553(a), the error was harmless because it did not affect the outcome of the sentencing proceeding. The PSR had raised the possibility of a Guidelines departure on essentially the same grounds as the variance—the likelihood that petitioner would commit future crimes. Moreover, that issue was the central focus of the sentencing hearing, and the difference between the top of the applicable range

and the sentence petitioner received was only nine months. Petitioner therefore had every incentive and opportunity to present evidence and argument about his future dangerousness. And the additional evidence that he now claims he would have presented would not have affected his sentence.

A. This Court Should Decide The Harmless Error Issue

Petitioner requests (Pet. Br. 29-31) that the Court decline to address whether the notice deficiency was harmless. The Court should reject that request.

As the prevailing party below, the government is entitled to defend the judgment on any ground supported by the record. *Bennett* v. *Spear*, 520 U.S. 154, 166-167 (1997). The harmless-error issue was fully briefed and argued below, see Gov't C.A. Br. 17-23; Pet. C.A. Reply 1-5; Gov't Rule 28(j) Letter (Mar. 22, 2006), and raised in the government's Brief in Opposition to the petition for a writ of certiorari, Br. in Opp. 13. The issue is therefore properly before this Court. Although the Court is not required to address the issue, the Court "plainly ha[s] the authority" to do so, and it has resolved harmlessness questions on numerous occasions. *United States* v. *Lane*, 474 U.S. 438, 450 (1986) (quoting *United States* v. *Hastings*, 461 U.S. 499, 510 (1983) (citing cases)). The Court should do the same here.

The parties have fully briefed the issue, the record is well developed but small, and the issue is contained. Resolving the issue therefore would not be overly burdensome. At the same time, the Court's resolution of the issue would provide vital guidance to the lower courts. Those courts are likely to be confronted with a significant number of cases presenting harmless-error

questions because half the circuits have erroneously read Rule 32 as limited to Guidelines departures.

B. *Kotteakos* Governs The Harmlessness Inquiry

Petitioner erroneously contends (Pet. Br. 30-31) that, before the Court can decide the harmless-error issue, the Court must decide whether notice of the variance in this case was required by the Due Process Clause. That contention is based on the erroneous assumption that resolution of the due process issue is necessary to determine which harmless-error standard applies to the district court's violation of Rule 32. Contrary to that assumption, the non-constitutional harmless-error standard of *Kotteakos* v. *United States*, 328 U.S. 750 (1946), applies to the Rule 32 violation, regardless of whether the lack of notice may also have violated due process.

Constitutional errors are reviewed for harmlessness under the standard in *Chapman* v. *California*, 386 U.S. 18, 24 (1967), which requires reversal unless the error is harmless beyond a reasonable doubt. For non-constitutional errors, however, reversal is required only if it is "highly probable" that the error had a "substantial and injurious effect or influence" in determining the outcome of the proceeding. *Kotteakos*, 328 U.S. at 776. The *Kotteakos* standard applies to violations of the Federal Rules of Criminal Procedure, including Rule 32. See, *e.g.*, *Lane*, 474 U.S. at 449 (applying *Kotteakos* to a violation of Fed. R. Crim. P. 8).

That conclusion is not affected by whether the notice deficiency was also a violation of due process. Petitioner has never, even in his briefs in this Court, raised a due process claim. Instead, he has consistently claimed only a violation of Rule 32 and the interpretation of that rule adopted in *Burns*, which declined to decide whether no-

tice is required by due process, see 501 U.S. at 138. See J.A. 377; Pet. C.A. Br. 15-18; Pet. C.A. Reply Br. 1-4; Pet. i, 5-10; Pet. Br. 24-25. Only a separate due process claim, if properly preserved and decided in petitioner's favor, would be reviewed under the *Chapman* harmless-error standard. See *United States* v. *Ramirez*, 479 F.3d 1229, 1246-1247 (10th Cir. 2007) (applying *Kotteakos* standard to admission of evidence in violation of hearsay rules because defendant did not also object based on alleged Confrontation Clause violation), cert. denied, 128 S. Ct. 1074 (2008); accord, *e.g.*, *United States* v. *Dukagjini*, 326 F.3d 45, 59-60 (2d Cir. 2003), cert. denied, 541 U.S. 1042 (2004).

Petitioner's theory—that, in order to ascertain the harmlessness of any violation of a rule or statute that has potential constitutional implications, courts must resolve unpreserved constitutional claims—cannot be correct. That approach would seriously undermine the doctrine of constitutional avoidance that this Court applied in *Burns*. There would be little point in a court's finding a violation of Rule 32 (or some other rule or statute) in order to avoid deciding a constitutional issue if the court would nonetheless have to decide that very issue in order to conduct the requisite harmless-error review. Because petitioner has properly preserved only a Rule 32 claim, the *Kotteakos* standard of harmless-error review applies.[6]

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[6] In its court-of-appeals brief (at 18), the government erroneously stated that the *Chapman* standard applies. The government later corrected that misstatement and informed the court of appeals that *Kotteakos* provides the applicable standard. Gov't 28(j) Letter 2.

C. The Notice Deficiency Did Not Affect Petitioner's Presentation At Sentencing

In any case, the district court's error in failing to give notice of the Section 3553(a) variance was harmless under both the *Kotteakos* and the *Chapman* standards. Beyond a reasonable doubt, petitioner's sentence would not have been different if the court had complied with Rule 32's notice requirement.

The district court varied above the recommended Guidelines range based on its conclusion that petitioner would "continue, as his ex-wife testified, in [his criminal] conduct" and, therefore, "the maximum time that he can be incapacitated is what is best for society." J.A. 374. As the court of appeals explained (J.A. 398-399), the district court thus concluded that an above-Guidelines sentence was necessary "to protect the public from further crimes" by petitioner. 18 U.S.C. 3553(a)(2)(C). Petitioner did not receive notice that the court might vary under Section 3553(a)(2)(C) based on the likelihood that he would commit further crimes. But petitioner did have notice that the likelihood that he would commit further crimes would be a central issue at sentencing and might support an above-Guidelines sentence.

The PSR, in a section entitled "Factors That May Warrant Departure," specifically stated that the sentencing court "may consider imposing a sentence departing from the otherwise applicable guideline range" under Guidelines § 4A1.3 based on "whether or not the defendant's criminal history category adequately reflects the defendant's past criminal conduct or *the likelihood that the defendant will commit other crimes*." J.A. 417 (emphasis added). Because petitioner knew that "the likelihood that [he would] commit other crimes" might be the basis for an above-Guidelines sentence, he had

every incentive to introduce evidence and argument on that issue.[7]

Petitioner provides no substantial reason to believe that he "would have done things differently" at sentencing if he had been given notice that the court was considering his future dangerousness in deciding whether to vary rather than to depart. *United States* v. *Himler*, 355 F.3d 735, 742 (3d Cir. 2004). And the court consequently would have imposed the same nine-month upward variance to maximize the protection of the public from petitioner's proclivity to make terroristic threats (and possibly carry them out). Accordingly, the notice deficiency was harmless. See *United States* v. *Tate*, No. 06-6529, 2008 WL 398312, at *8 (6th Cir. Feb. 15, 2008) (finding no plain error where PSR gave notice of a possible departure under Guidelines § 4A1.3 and district court varied under Section 3553(a) on the same factual basis).

Any differences between a Guidelines departure under Section 4A1.3 and a variance under Section 3553(a)(2)(C) did not affect petitioner's incentive or opportunity to address the likelihood that he would commit further crimes. That issue was central to both potential grounds for deviating from the Guidelines range. And much of the factual evidence on which the district court relied for the Section 3553(a)(2)(C) variance would have

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[7] Indeed, it could be argued that, because the PSR raised the possibility of a departure under Guidelines § 4A1.3, there was no notice error at all. The government has not made that argument, because a Section 4A1.3 departure, unlike a Section 3553(a)(2)(C) variance, requires a determination that the defendant's criminal history category under-represents the likelihood that he will commit future crimes. That difference, however, does not affect the harmless error analysis for the reasons explained in the text following this note.

supported a Section 4A1.3 departure. The court noted that it was persuaded by the testimony of petitioner's ex-wife. J.A. 374. Consistent with the facts in the PSR (J.A. 404-406, 410), she testified about petitioner's past physical and mental abuse of her and her children, as well as petitioner's 2001 violation of a protective order. J.A. 306-322. The district court also heard testimony, consistent with the facts in the PSR (J.A. 405-406), that, after his arrest, petitioner told his cellmate that he wanted to hire someone to kill his ex-wife's new husband. J.A. 336. None of that conduct was reflected in petitioner's criminal history category, and it therefore would have supported a departure under Section 4A1.3.[8] Because the district court could have imposed the same sentence as a Section 4A1.3 departure, a possibility of which petitioner indisputably had notice, the lack of notice of the variance was harmless. Cf. *Mohamed*, 459 F.3d at 987.

Even if there had been no possibility of a Section 4A1.3 departure, petitioner would still have had ample incentive and opportunity to address his propensity to commit further crimes. As petitioner could have anticipated, the prospect that he would continue his criminal conduct was the central focus of the sentencing hearing. It was the thrust of the victim-impact testimony of his

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[8] See *United States* v. *Carter*, 111 F.3d 509, 514-515 (7th Cir. 1997) (upholding Section 4A1.3 departure based in part on victim's testimony of defendant's past violence towards her and others); *United States* v. *Fayette*, 895 F.2d 1375, 1380 (11th Cir. 1990) (Section 4A1.3 departure may be justified based on offenses committed after defendant's guilty plea); Guidelines § 4A1.3(a)(2)(A) (departure may be based on prior sentence that did not count towards criminal history score); *id.* § 4A1.2 comment. (n.6) ("the criminal conduct underlying any conviction that is not counted in the criminal history score may be considered pursuant to § 4A1.3").

ex-wife (J.A. 306-322), who petitioner knew would be testifying at the hearing (J.A. 293). Nonetheless, after she testified that she was "certain" petitioner "w[ould] not stop" his threatening and abusive behavior (J.A. 320), he did not object that he lacked notice that the likelihood that he would commit further crimes would be at issue, nor did he request a continuance to develop more evidence or argument. Instead, he addressed his future dangerousness by taking the stand, denying many of his ex-wife's allegations, and contending that he would not threaten or harm her, her children, or her new husband in the future. J.A. 347-364.

The likelihood that petitioner would commit future crimes was also central to disputes over adjustments to his sentencing Guidelines range. The PSR recommended against a downward adjustment for acceptance of responsibility because it found that petitioner "continues to engage in, or attempt to engage in, criminal activity," as evidenced by his attempt to solicit his cellmate to kill his ex-wife's new husband. J.A. 406. The cellmate testified at the sentencing hearing (J.A. 333-347), and petitioner responded by testifying personally (J.A. 356) and arguing through counsel (J.A. 367) that the cellmate was lying. The district court denied the adjustment because it concluded that the cellmate had testified truthfully and that petitioner "still intends to threaten and to terrorize [his ex-wife] by whatever means he can." J.A. 372. The likelihood that petitioner would commit additional crimes was also central to the dispute over an upward adjustment based on his intent to carry out the threats in his e-mails. Arguing against the adjustment, defense counsel contended that petitioner "brags, he boasts, and he talks a lot," but he had no actual intent to harm his ex-wife or others. J.A. 366.

In finding the enhancement applicable, the district court concluded that petitioner "did in fact intend and does have a current intent, if he is able to, to carry out these threats." J.A. 371.

Because the likelihood that petitioner would commit future crimes was already central to the sentencing hearing, it is clear that petitioner's presentation at the hearing would not have been materially different if he had received notice that his future dangerousness would also be considered as grounds for a variance. That is especially true because there is only a nine month difference between the top of the Guidelines range and the variant sentence imposed by the district court. The lack of notice was therefore harmless. See *United States* v. *Milton*, 147 F.3d 414, 421 (5th Cir. 1998) (no plain error where defendant had notice that issue on which court based departure would be central to sentencing).

D. The Evidence That Petitioner Now Claims He Would Have Presented Would Not Have Affected His Sentence

Until petitioner filed his merits brief in this Court, he never identified any evidence or argument that he would have made if he had received notice that the district court was considering a variance. Petitioner now claims that he would have presented testimony by Dr. Bennett, the defense expert who testified at his competency hearing, that his threats were "fueled by his mental illness," that his symptoms "could be successfully treated through antipsychotic medications and psychotherapy," and that incarceration was "likely to *increase* his delusional ideations" and alternative forms of supervision would be preferable. Pet. Br. 32. That evidence would not have affected the district court's sentencing decision

and therefore does not undermine the conclusion that the notice deficiency was harmless.

Petitioner actually presented at sentencing essentially the same argument that he now contends he failed to present because of the lack of notice. Defense counsel argued to the court that petitioner is "struggling with mental illness. He's going to get treatment, he's going to do right, he's going to be with us no matter what we do. In three or four years, one or two years, he's going to be on the street. And I think at this point we all need to get together and figure out what will satisfy all our interests; and that's for him to get the help he needs and to get on with his life." J.A. 368. If petitioner thought testimony from Dr. Bennett supporting that argument would be useful, he had every incentive and opportunity to offer it. Petitioner acknowledges that Dr. Bennett's testimony was "available." Pet. Br. 32-33. Defense counsel could have, but did not, seek to introduce that testimony or the report that Dr. Bennett had prepared for the competency hearing. Instead, counsel urged the court to consider a psychiatric report that had been prepared by the Bureau of Prisons shortly before the sentencing hearing, which stated that petitioner had refused psychiatric treatment. J.A. 365; Butner FMC Report 11.

In any event, the district court had already received Dr. Bennett's report. J.A. 2. The report addressed the issues that petitioner suggests Dr. Bennett would have raised at sentencing. Bennett Report 5. Contrary to petitioner's description of Dr. Bennett's likely testimony, however, his report does not state that petitioner's condition can be "successfully treated" but states only that medications "may well improve [petitioner's] thinking." *Ibid.* Cumulative testimony about

that theoretical possibility would not have altered the court's conclusions about petitioner's future dangerousness.

That is particularly clear because the district court had already rejected Dr. Bennett's diagnosis that petitioner suffers from a delusional disorder that could be treated with antipsychotic drugs. J.A. 267-268. Instead, the district court had accepted the diagnosis of the government's psychiatric expert, Dr. Buigas, that petitioner suffers from a personality disorder (*ibid.*), a diagnosis that petitioner also now accepts (Pet. Br. 3 & n.2). As Dr. Buigas testified, petitioner's personality disorder is "characterological" in nature, "long-standing," and "resistant to change." Buigas Report 10-11; see J.A. 127, 136-137, 138, 269. Contrary to petitioner's suggestion (Pet. Br. 7 n.3), Dr. Buigas did not testify that petitioner could be successfully treated with antipsychotic drugs. Instead, Dr. Buigas testified that those drugs "could mitigate" some symptoms if petitioner had a delusional disorder, a diagnosis that both Dr. Buigas and the district court rejected. J.A. 146, 268. Moreover, the district court was aware at sentencing that petitioner had refused psychiatric medication in the past (J.A. 146), had again refused such medication (Butner FMC Report 11), and was "not motivated to engage in any treatment" (*id.* at 14).

Petitioner's long history of violence towards his ex-wife and their children—detailed in his ex-wife's testimony (J.A. 303-322), confirmed by the findings of the judge who presided over their divorce (J.A. 411), and set forth in the psychiatric reports submitted to the district court, *e.g.*, Butner FMC Report 3-4—established that petitioner was a danger in the past and would pose a danger in the future. Accordingly, petitioner's sentence

would have been no different if he had received specific notice of the Section 3553(a) variance based on the likelihood that he would commit future crimes. The lack of notice of the variance was harmless error.[9]

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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MARCH 2008

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[9] Petitioner is currently scheduled to be released from imprisonment, after consideration of good time credits, on May 5, 2008. His release would not, however, render the case moot. If this Court disagrees with the government and concludes that the lack of notice was harmful error, petitioner could request the district court to exercise its discretion under 18 U.S.C. 3583(e) (2000 & Supp. V 2005) to reduce his term of supervised release. See *United States* v. *Johnson*, 529 U.S. 53, 60 (2000).

APPENDIX

RELEVANT CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

1. The Fifth Amendment to the United States Constitution provides, in pertinent part:

> No person shall * * * be deprived of life, liberty, or property, without due process of law.

2. Section 3553 of Title 18 of the United States Code (2000 & Supp. V 2005) provides, in pertinent part:

Imposition of a sentence

(a) FACTORS TO BE CONSIDERED IN IMPOSING A SENTENCE.—The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

> (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
>
> (2) the need for the sentence imposed—
>
> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
>
> (B) to afford adequate deterrence to criminal conduct;
>
> (C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for—

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742 (g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incor-

porated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement—

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.[1]

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

(b) APPLICATION OF GUIDELINES IN IMPOSING A SENTENCE.—

(1) In General—Except as provided in paragraph (2), the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Com-

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[1] So in original. The period probably should be a semicolon.

mission in formulating the guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission.[*]

(2) Child crimes and sexual offenses—

(A)[2] **Sentencing**—In sentencing a defendant convicted of an offense under section 1201 involving a minor victim, an offense under section 1591, or an offense under chapter 71, 109A, 110, or 117, the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless—

> (i) the court finds that there exists an aggravating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence greater than that described;

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[*] In *United States* v. *Booker*, 543 U.S. 220 (2005), this provision was severed by the Court in order to remedy a Sixth Amendment violation.

[2] So in original. No subpart (B) has been enacted.

(ii) the court finds that there exists a mitigating circumstance of a kind or to a degree, that—

(I) has been affirmatively and specifically identified as a permissible ground of downward departure in the sentencing guidelines or policy statements issued under section 994(a) of title 28, taking account of any amendments to such sentencing guidelines or policy statements by Congress;

(II) has not been taken into consideration by the Sentencing Commission in formulating the guidelines; and

(III) should result in a sentence different from that described; or

(iii) the court finds, on motion of the Government, that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense and that this assistance established a mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence lower than that described.

In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission, together with any amendments thereto by act of Congress. In the absence of an applicable sentencing guideline, the court

shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission, together with any amendments to such guidelines or policy statements by act of Congress.

(c) STATEMENT OF REASONS FOR IMPOSING A SENTENCE.—The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence, and, if the sentence—

(1) is of the kind, and within the range, described in subsection (a)(4), and that range exceeds 24 months, the reason for imposing a sentence at a particular point within the range; or

(2) is not of the kind, or is outside the range, described in subsection (a)(4), the specific reason for the imposition of a sentence different from that described, which reasons must also be stated with specificity in the written order of judgment and commitment, except to the extent that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32. In the event that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32 the court shall state that such statements were so received and that it relied upon the content of such statements.

If the court does not order restitution, or orders only partial restitution, the court shall include in the statement the reason therefor. The court shall provide a transcription or other appropriate public record of the courts, statement of reasons, together with the order of judgment and commitment, to the Probation System and to the Sentencing Commission,,[3] and, if the sentence includes a term of imprisonment, to the Bureau of Prisons.

3. Section 3742 of Title 18 of the United States Code (2000 & Supp. V 2005) provides, in pertinent part:

Review of a sentence

(a) APPEAL BY A DEFENDANT.—A defendant may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence—

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines; or

(3) is greater than the sentence specified in the applicable guideline range to the extent that the sentence includes a greater fine or term of imprisonment, probation, or supervised release than the maximum established in the guideline range, or includes a more limiting condition of probation or supervised release under section 3563(b)(6) or (b)(11) than the maximum established in the guideline range; or

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[3] So in original. The second comma probably should not appear.

(4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.

(b) APPEAL BY THE GOVERNMENT.—The Government may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence—

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines;

(3) is less than the sentence specified in the applicable guideline range to the extent that the sentence includes a lesser fine or term of imprisonment, probation, or supervised release than the minimum established in the guideline range, or includes a less limiting condition of probation or supervised release under section 3563(b)(6) or (b)(11) than the minimum established in the guideline range; or

(4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.

The Government may not further prosecute such appeal without the personal approval of the Attorney General, the Solicitor General, or a deputy solicitor general designated by the Solicitor General.

* * * * *

(f) DECISION AND DISPOSITION.—If the court of appeals determines that—

(1) the sentence was imposed in violation of law or imposed as a result of an incorrect application of the sentencing guidelines, the court shall remand

the case for further sentencing proceedings with such instructions as the court considers appropriate;

(2) the sentence is outside the applicable guideline range and the district court failed to provide the required statement of reasons in the order of judgment and commitment, or the departure is based on an impermissible factor, or is to an unreasonable degree, or the sentence was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable, it shall state specific reasons for its conclusions and—

(A) if it determines that the sentence is too high and the appeal has been filed under subsection (a), it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate, subject to subsection (g);

(B) if it determines that the sentence is too low and the appeal has been filed under subsection (b), it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate, subject to subsection (g);

(3) the sentence is not described in paragraph (1) or (2), it shall affirm the sentence.

(g) SENTENCING UPON REMAND.—A district court to which a case is remanded pursuant to subsection (f)(1) or (f)(2) shall resentence a defendant in accordance with section 3553 and with such instructions as

may have been given by the court of appeals, except that—

(1) In determining the range referred to in subsection 3553(a)(4), the court shall apply the guidelines issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, and that were in effect on the date of the previous sentencing of the defendant prior to the appeal, together with any amendments thereto by any act of Congress that was in effect on such date; and

(2) The court shall not impose a sentence outside the applicable guidelines range except upon a ground that—

(A) was specifically and affirmatively included in the written statement of reasons required by section 3553(c) in connection with the previous sentencing of the defendant prior to the appeal; and

(B) was held by the court of appeals, in remanding the case, to be a permissible ground of departure.

* * * * *

(j) DEFINITIONS.—For purposes of this section—

(1) a factor is a "permissible" ground of departure if it—

(A) advances the objectives set forth in section 3553(a)(2); and

(B) is authorized under section 3553(b); and

(C) is justified by the facts of the case; and

(2) a factor is an "impermissible" ground of departure if it is not a permissible factor within the meaning of subsection (j)(1).

4. Section 5037 of Title 18 of the United States Code (2000 & Supp. V 2005) provides, in pertinent part:

Dispositional hearing

* * * * *

(c) The term for which official detention may be ordered for a juvenile found to be a juvenile delinquent may not extend—

(1) in the case of a juvenile who is less than eighteen years old, beyond the lesser of—

(A) the date when the juvenile becomes twenty-one years old;

(B) the maximum of the guideline range, pursuant to section 994 of title 28, applicable to an otherwise similarly situated adult defendant unless the court finds an aggravating factor to warrant an upward departure from the otherwise applicable guideline range; or

(C) the maximum term of imprisonment that would be authorized if the juvenile had been tried and convicted as an adult; or

(2) in the case of a juvenile who is between eighteen and twenty-one years old—

(A) who if convicted as an adult would be convicted of a Class A, B, or C felony, beyond the lesser of—

(i) five years; or

(ii) the maximum of the guidelines range, pursuant to section 994 of title 28, applicable to an otherwise similarly situated adult defendant unless the court finds an aggravating factor to warrant an upward departure from the otherwise applicable guideline range; or

(B) in any other case beyond the lesser of—

(i) three years; or

(ii) the maximum of the guideline range, pursuant to section 994 of title 28, applicable to an otherwise similarly situated adult defendant unless the court finds an aggravating factor to warrant an upward departure from the otherwise applicable guideline range; or

(iii) the maximum term of imprisonment that would be authorized if the juvenile had been tried and convicted as an adult

5. Rule 32 of the Federal Rules of Criminal Procedure provides, in pertinent part:

Sentencing and Judgment

* * * * *

(c) Presentence Investigation.

(1) *Required Investigation.*

(A) *In General.* The probation officer must conduct a presentence investigation and submit a report to the court before it imposes sentence unless:

(i) 18 U.S.C. § 3593(c) or another statute requires otherwise; or

(ii) the court finds that the information in the record enables it to meaningfully exercise its sentencing authority under 18 U.S.C. § 3553, and the court explains its finding on the record.

(B) *Restitution.* If the law requires restitution, the probation officer must conduct an investigation and submit a report that contains sufficient information for the court to order restitution.

(2) ***Interviewing the Defendant.*** The probation officer who interviews a defendant as part of a presentence investigation must, on request, give the defendant's attorney notice and a reasonable opportunity to attend the interview.

(d) Presentence Report.

(1) ***Applying the Advisory Sentencing Guidelines.*** The presentence report must:

(A) identify all applicable guidelines and policy statements of the Sentencing Commission;

(B) calculate the defendant's offense level and criminal history category;

(C) state the resulting sentencing range and kinds of sentences available;

(D) identify any factor relevant to:

(i) the appropriate kind of sentence, or

(ii) the appropriate sentence within the applicable sentencing range; and

(E) identify any basis for departing from the applicable sentencing range.

(2) ***Additional Information.*** The presentence report must also contain the following information:

(A) the defendant's history and characteristics, including:

(i) any prior criminal record;

(ii) the defendant's financial condition; and

(iii) any circumstances affecting the defendant's behavior that may be helpful in imposing sentence or in correctional treatment;

(B) verified information, stated in a nonargumentative style, that assesses the financial, social, psychological, and medical impact on any individual against whom the offense has been committed;

(C) when appropriate, the nature and extent of nonprison programs and resources available to the defendant;

(D) when the law provides for restitution, information sufficient for a restitution order;

(E) if the court orders a study under 18 U.S.C. § 3552(b), any resulting report and recommendation; and

(F) any other information that the court requires, including information relevant to the factors under 18 U.S.C. § 3553(a).

(3) ***Exclusions.*** The presentence report must exclude the following:

(A) any diagnoses that, if disclosed, might seriously disrupt a rehabilitation program;

(B) any sources of information obtained upon a

promise of confidentiality; and

(C) any other information that, if disclosed, might result in physical or other harm to the defendant or others.

(e) Disclosing the Report and Recommendation.

(1) ***Time to Disclose.*** Unless the defendant has consented in writing, the probation officer must not submit a presentence report to the court or disclose its contents to anyone until the defendant has pleaded guilty or nolo contendere, or has been found guilty.

(2) ***Minimum Required Notice.*** The probation officer must give the presentence report to the defendant, the defendant's attorney, and an attorney for the government at least 35 days before sentencing unless the defendant waives this minimum period.

(3) ***Sentence Recommendation.*** By local rule or by order in a case, the court may direct the probation officer not to disclose to anyone other than the court the officer's recommendation on the sentence.

(f) Objecting to the Report.

(1) ***Time to Object.*** Within 14 days after receiving the presentence report, the parties must state in writing any objections, including objections to material information, sentencing guideline ranges, and policy statements contained in or omitted from the report.

(2) ***Serving Objections.*** An objecting party must provide a copy of its objections to the opposing party and to the probation officer.

(3) ***Action on Objections.*** After receiving objections, the probation officer may meet with the parties to discuss the objections. The probation officer may

then investigate further and revise the presentence report as appropriate.

(g) Submitting the Report. At least 7 days before sentencing, the probation officer must submit to the court and to the parties the presentence report and an addendum containing any unresolved objections, the grounds for those objections, and the probation officer's comments on them.

(h) Notice of Possible Departure from Sentencing Guidelines. Before the court may depart from the applicable sentencing range on a ground not identified for departure either in the presentence report or in a party's prehearing submission, the court must give the parties reasonable notice that it is contemplating such a departure. The notice must specify any ground on which the court is contemplating a departure.

(i) Sentencing.

(1) ***In General.*** At sentencing, the court:

(A) must verify that the defendant and the defendant's attorney have read and discussed the presentence report and any addendum to the report;

(B) must give to the defendant and an attorney for the government a written summary of—or summarize in camera—any information excluded from the presentence report under Rule 32(d)(3) on which the court will rely in sentencing, and give them a reasonable opportunity to comment on that information;

(C) must allow the parties' attorneys to comment on the probation officer's determinations

and other matters relating to an appropriate sentence; and

(D) may, for good cause, allow a party to make a new objection at any time before sentence is imposed.

(2) ***Introducing Evidence; Producing a Statement.*** The court may permit the parties to introduce evidence on the objections. If a witness testifies at sentencing, Rule 26.2(a)-(d) and (f) applies. If a party fails to comply with a Rule 26.2 order to produce a witness's statement, the court must not consider that witness's testimony.

(3) ***Court Determinations.*** At sentencing, the court:

(A) may accept any undisputed portion of the presentence report as a finding of fact;

(B) must—for any disputed portion of the presentence report or other controverted matter—rule on the dispute or determine that a ruling is unnecessary either because the matter will not affect sentencing, or because the court will not consider the matter in sentencing; and

(C) must append a copy of the court's determinations under this rule to any copy of the presentence report made available to the Bureau of Prisons.

(4) ***Opportunity to Speak.***

(A) *By a Party.* Before imposing sentence, the court must:

(i) provide the defendant's attorney an opportunity to speak on the defendant's behalf;

(ii) address the defendant personally in order to permit the defendant to speak or present any information to mitigate the sentence; and

(iii) provide an attorney for the government an opportunity to speak equivalent to that of the defendant's attorney.

(B) *By a Victim.* Before imposing sentence, the court must address any victim of a crime of violence or sexual abuse who is present at sentencing and must permit the victim to speak or submit any information about the sentence. Whether or not the victim is present, a victim's right to address the court may be exercised by the following persons if present:

(i) a parent or legal guardian, if the victim is younger than 18 years or is incompetent; or

(ii) one or more family members or relatives the court designates, if the victim is deceased or incapacitated.

(C) *In Camera Proceedings.* Upon a party's motion and for good cause, the court may hear in camera any statement made under Rule 32(i)(4).